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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-1528

MIDWEST HANGER COMPANY AND LIBERTY ENGINEERING CORPORATION, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reason for Granting the Writ	7
The Decision of the Court of Appeals Is in Conflict With Applicable Decisions of This Court	7
Conclusion	12
Appendix	1a

CITATIONS

CASES:

NLRB v. *Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965) 2, 8, 10

S.E.C. v. *Chenery Corp.*, 332 U.S. 194 (1947) 2, 7, 10

Universal Camera Corporation v. *NLRB*, 340 U.S. 474 (1951) 2, 10

STATUTES:

28 U.S.C. § 1254(1) 2

29 U.S.C. § 158(a)(1) 3

29 U.S.C. § 158(a)(3) 3

29 U.S.C. § 158(a)(5) 3

29 U.S.C. § 160(e) 2, 5

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Petitioner, Midwest Hanger Company and Liberty Engineering Corporation, respectfully prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 20, 1973, and March 21, 1973, respectively.

OPINIONS BELOW

The decision of the Court of Appeals from which this petition is filed is not yet officially reported. It is reproduced herein as Appendix "A" commencing at page 1a. A Petition for Rehearing En Banc of this de-

cision was denied on March 15, 1973 (Appendix "E p. 15a), and Judgment for Respondent, printed pages 16a-20a, Appendix "C", was entered on Mar 21, 1973. Petitioner's motion to stay the court's ma date pending the outcome of this petition was grant on April 12, 1973, and a copy of the court's Order printed herein as Appendix "D", p. 21a. The Cou of Appeals' decision affirmed in part and denied in pa enforcement of an order of the National Labor Rel tions Board, 193 NLRB No. 85 (1971), reprinted her in as Appendix "E", pages 22a-23a. That decision, turn, affirmed a decision rendered by Trial Examin Ivar Peterson which is reprinted herein as Append "F", pages 24a-72a.

JURISDICTION

The judgment of the Court of Appeals for the Eigh Circuit, following a denial of a Petition for Rehearin En Banc on March 15, 1973, was entered on March 2 1973, and this Petition for Certiorari was filed with 90 days of the court's judgment. This Court's juri diction is invoked under 28 U.S.C. § 1254(1) and 2 U.S.C. § 160(e).

QUESTIONS PRESENTED

1. Whether, under the principles expressed by thi Court in *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, an *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, th Court of Appeals may uphold the Board's decision b substituting its own rationale for that relied upon b the Board.

2. Whether the Court of Appeals misapprehended it role as set forth by this Court in *Universal Camer Corporation* v. *NLRB*, 340 U.S. 474.

STATUTES INVOLVED

The statutes involved are 29 U.S.C. § 158(a)(1), (3), and (5) which are set out in full in Appendix "G" to this petition at pages 73a-74a.

STATEMENT OF THE CASE

The issues in this petition arise out of the discharge of eighteen named individuals at the Petitioner's plant between June and August, 1970.

Midwest Hanger Company and Liberty Engineering Corporation (hereinafter "the Company") operate a small business producing laundry and drycleaning packaging products (App. 2a, 25a). Economic circumstances forced the Company to raise the price for these products in May, 1970 effective June, 1970. As a consequence, the Company anticipated—accurately as it turned out—that customers would stock up prior to the price increase, and that orders would be severely reduced for a significant period thereafter. This was, in fact, the case, and Company sales after June plummeted (App. 2a).[1]

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[1] As found by the Board (App. 56a), the undisputed record showed the following sales pattern in 1970:

January	$202,000
February	203,000
March	227,000
April	236,000
May	210,000
June	315,000
July	127,000
August	145,000
September	218,000
October	139,000
November	192,000
December	201,000

To try to head off economic disaster, Company Pre dent Jones, just prior to the price increase taki effect, telephoned his General Manager, Ward, and Plant Manager, Brown, and ordered a reduction in t number of Company employees. Ward and Brown, turn, met over the weekend of June 13 and 14 and c cided to terminate immediately 15 employees and su employees began to be notified of this decision duri that weekend (App. 36a, 39a, 40a, 44a, 45a). Thr other employees, who the Board held were discrim natees, were terminated in subsequent months, alo with many other employees whose terminations we not challenged by the Board in its Complaint again Petitioner (App. 34-35a, 37a). In determining whi employees to sever, Ward and Brown looked to the em ployees' work and attendance records and job pe formance in addition to releasing employees whose jo functions were not economical to maintain (App. 3 28a, 40a, 43a, 44a, 48a).

The Trial Examiner, whose decision was adopted *pr forma* by the Board, viewed the cutbacks recited abov as pretextual and found that the Company's real mot vation was to undercut an organizational drive by th United Steelworkers of America (the "Union"), whic had filed with the Board a petition for representatio of the employees which the Company received o Monday, June 15, 1970. There was no showing of an prior knowledge by the Company of the Union organiz ing campaign before it received a copy of the petitio for representation (App. 2a). To support its view the Board relied heavily on the argument that:

> "... approximately 99 percent of those terminated were members of the Union, whereas the Union signed up only 75 percent of the employees." (App 60a).

In addition, the Board argued that it was inconsistent for the Company to terminate employees and then advertise for and hire new employees in the succeeding months (App. 32a, 60a).

However, Petitioner demonstrated to the court below[2] that the Board's "percentage argument" was based upon the selectivity with which counsel for the General Counsel picked those employees on behalf of whom he charged discrimination; and that in fact many other nonunion employees had been discharged by the Company during the same period and for the same reasons as the Company gave for those the Board held had been discriminatorally discharged.[3] The Court of Appeals recognized the validity of Petitioner's argument, since it acknowledged:

> "The company challenges these statistics by countering that other discharges of non-union adherents during the same period of time as the discharges in question would alter the figures. *This may be correct* but there still exists substantial evidence in the record from which the Board *could* infer that the discharges questioned were discriminatory" (App. 4a). (Emphasis supplied).

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[2] The jurisdiction of the court below was invoked under 29 U.S.C. § 160(e).

[3] Specifically, the Company demonstrated to the court that in addition to the 18 terminations which counsel for the General Counsel decided to litigate, there were in addition 17 terminations for similar stated reasons in the same time period, some of whose names had even appeared in earlier versions of counsel for the General Counsel's complaint against the Company. Thus, when all terminations for similar reasons during the same time period were considered, approximately 54% of those terminated were union adherents whereas the general support for the union in the plant was 75%. The Company was not, therefore, discharging union adherents in greater proportion to their overall strength in the plant as found by the Board.

The court below also found that the Company had demonstrated a proper business purpose for the discharges in holding that "a reduction in work force was clearly in order" (App. 3a).

Despite the above, however, the Court of Appeals nonetheless held that 17 of the Company's 18 discharges chosen by counsel for the General Counsel to be litigated as allegedly discriminatory were, as a matter of law, discriminatory. The touchstone of the court's rationale was the following:

> "These discharges must be considered along with the Company's assertion that its biggest problem was employee turnover and the resulting inexperience of its work force. The Company alleged that the employees selected for termination were so selected because they were the least efficient of the Company's work force. *This explanation implied that the employees met the minimum level of competency* required to perform the work. The Company chose to ignore this ready pool of at least minimally qualified persons when it needed additional employees to replace the normal turnover occurring after the reduction in force. Instead of utilizing previously experienced employees, it recruited new, untrained personnel. This action was inconsistent with both the reasonable needs of the business and, more importantly, with the employer's past practice during slack business periods." (App. 5a) (emphasis supplied).

The Court's contention that the Company should have *rehired* old employees to counter subsequent continuing employee turnover introduced a new element into the proceedings not previously the subject of evidence or cross examination at the hearing and not previously relied upon by the Trial Examiner or the

Board. The Trial Examiner and Board had faulted the Company's reasoning that it *was* necessary to discharge so many employees at once; in fact, the Trial Examiner with apparent Board approval surmised that "a more sensible course" for the Company would have been not to discharge experienced personnel at all (App. 54a). The court below, on the other hand *accepted* the Company's view that its economic situation required a drastic reduction in personnel; but then found a discriminatory motivation in the Company's *subsequent* decision not to rehire these employees.

On this basis, the court ordered the reinstatement of 17 employees, even though one employee in this group was not shown to have been a Union supporter, two employees had severe medical problems, and the others admittedly were frequently absent from their jobs or were unqualified to perform the work. The court also ordered the Company to recognize and bargain with the Union without the necessity of an election on the ground that the Company's allegedly discriminatory conduct had made a free election impossible.

REASON FOR GRANTING THE WRIT

The Decision of the Court of Appeals Is in Conflict With Applicable Decisions of This Court

In *S.E.C.* v. *Chenery Corporation*, 332 U.S. 194, 195 (1947), the Supreme Court cautioned lower courts against providing alternate rationalizations of agency decisions in order to uphold those decisions. In the words of the Court,

> "... a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked

> by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency."

More recently, in *NLRB* v. *Metropolitan Life Insurance Company,* 380 U.S. 438, 444 (1965), the Court again, and this time in the context of the National Labor Relations Board, warned:

> "For reviewing courts to substitute . . . their discretion for that of the Board is incompatible with the orderly function of the process of judicial review."

The court below has failed to heed the admonition of this Court, and has fallen into serious error requiring this Court's correction. Specifically, the Court of Appeals introduced its own explanation to support a discriminatory finding against the Company in place of the discredited "percentage theory" which was basically relied upon by the Board. As noted above, the court's explanation, unlike the Board's, accepted as justified the Company's business decision to immediately discharge the employees ("a reduction in work force was clearly in order"), but found discrimination in the Company's later failure to rehire the terminated employees whom the court viewed as "minimally qualified," and hence superior to new hires.

The court below admits that its rationalization of the Board's ultimate finding of discrimination is pitched on a different basis that that of the Board. Thus, after admitting that the Company's answer to the Board's

percentage theory of liability was correct, the court baldly proclaimed that there was other "substantial evidence in the record from which the Board *could* infer that the discharges questioned were discriminatory" (App. 4a) (emphasis added). The court below thus admits that its substitute theory is one that the Board did not in fact rely on, but only "could" have relied upon. There is, therefore, no issue concerning whether the rationalization put forward for the first time by the Court of Appeals was relied upon in any way by the Board. The court below admits that it was not.

The wisdom and prudence of this Court's *Chenery-Metropolitan* line of cases is revealed by the difficulties of a rationalization for agency action supplied for the first time by a Court of Appeals.

The court's substitute theory of an "implication" that the terminated employees "met the minimum level of competency" and thus should have been rehired before new employees, has no substantial record support and assumes a fact not in evidence, i.e., that the discharged employees were better performers than new employees. The facts, however, pointed the other way. In deciding *who* to terminate, the Company looked primarily to the employee's absentee record and job performance. Those who were discharged were deficient in one or both categories. *A fortiori,* if the Company were justified in originally terminating them for these deficiencies, it would not wish to rehire these employees later, if it had an opportunity to obtain fresh personnel. This is even clearer because the Company had traditionally suffered from a severe absentee problem and was doing all it could to change that. Nor were the jobs involved so highly skilled that the Company

should have preferred recent dischargees to "green" employees, regardless of the former's absentee records or poor performance; in fact, the record showed that the jobs were low skilled (App. 31a). In any event, since the new theory now advanced by the Court of Appeals was not the theory on which the case was tried and decided by the Board, the parties never litigated the factual issue of whether the new personnel hired by the Company were in fact better performers than the employees terminated.

Furthermore, two of the dischargees had severe medical problems. David Covey had injured his back on the job; and Shirley Lauderdale had a skin infection that caused her hands to break out in a rash (App. 40a, 45a). Yet the clear conclusion from the Court of Appeals' decision is that the Company was bound to rehire these two employees now found by the court by an "implication" to be "minimally competent", regardless of their medical condition, on pain of being held in violation of the law. This unfair result graphically illustrates the reason for this Court's rule in *S.E.C.* v. *Chenery Corporation* and *NLRB* v. *Metropolitan Life Insurance Company* which the court below violated. Petitioner stands convicted, therefore, on an alternate theory not advanced in the trial of the case and not relied upon by the Trial Examiner or the Board. The inherent inequity of such a procedure has been obvious to this Court for at least twenty-six years.

In "substituting what it consider[ed] to be a more adequate or proper basis" for the end result reached by the Board, the Court of Appeals also ran afoul of this Court's decision in *Universal Camera Corporation* v. *NLRB,* 340 U.S. 474 (1951). That decision requires the Court of Appeals to uphold the Board only where

there is substantial evidence on the whole record to support the *Board's* decision. Clearly, the court below was of the view that such evidence did not exist, since it found itself forced to devise an alternate rationale for the Board which the Board "could" have relied upon, but did not. As a consequence, the court was bound by *Universal Camera* to deny the Board's request for enforcement of its order against the Petitioner. As this Court stated:

> ". . . courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. *The Board's findings* are entitled to respect; but they *must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.*" 340 U.S. at 490. (emphasis supplied).

Of course, as explained above, the court below refused to set aside the Board's findings even after the court agreed that the major ground underlying the Board's decision was faulty. As a consequence, the court failed to carry out its responsibilities to properly review the decision of the Board, and such failure requires reversal by this Court.

CONCLUSION

For the above specified reasons, the Petitioner prays that this Court grant a writ of certiorari to review the decision of the Court of Appeals.

Respectfully submitted,

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